Office-Supreme Court, U.S.
FILED
MAR 29 1966
JOHN F. DAVIS, CLERK

No. 1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

DORCHESTER GAS PRODUCING COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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March 29, 1966

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

Page

Table of Citations i

I. Relief Under *Sierra* and *Mobile* Need Not Conflict with the Area Rate Approach 2

II. Failure to Mention *Sierra* and *Mobile* Does Not Avoid Conflict Therewith 3

III. "Special-Exemption" Section of Commission's *Permian* Decision Suggests No Solution 4

IV. Conclusion 5

TABLE OF CITATIONS

CASES:

FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956) 2, 3, 4, 5

United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) 2, 3, 4, 5

FEDERAL POWER COMMISSION OPINION:

Area Rate Proceeding, AR61-1, Opinion No. 468, 34 FPC —— (August 5, 1965), appeal pending (10th Cir. Nos. 8385, *et al.*) 4

STATUTE:

Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w (1958)

Section 4 3

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner files this reply to the brief in opposition filed herein on March 23, 1966, by the Federal Power Commission (Commission).

I

Relief Under Sierra and Mobile Need Not Conflict With the Area Rate Approach

The Commission suggests (Opp. Br. 7) that where it has held individual rate hearings to determine the public interest it has not departed from its experimental area approach to the fixing of producers' rates for the reason that "it has not sought to determine the just and reasonable rates" in those individual hearings —the implication being that to determine an individual just and reasonable rate would somehow upset its area rate approach. Petitioner rejects this suggestion, but does not argue the point here for the reason that, even assuming its validity, there is no necessary incompatibility between the Commission's area approach and the immediate relief sought by petitioner. Methods by which the Commission might honor *Sierra*[1] and *Mobile*[2] without determining the just and reasonable rate for petitioner's sale can readily be devised.

One illustration will suffice. On the basis of *Sierra,* the Commission could grant petitioner an opportunity to adduce evidence of its individual cost of service. On the record thus made—and while expressly refraining from a determination of the just and reasonable rate—the Commission could then test whether petitioner's interest coincides with the public interest by finding whether or not its 7.1463-cent rate produces adverse consequences of the sort set forth in *Sierra.* If the foregoing public-interest test were met, the Commission could then authorize petitioner to make a filing under

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[1] FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

[2] United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956).

section 4 of the Act for a rate increase up to its cost of service, suspend that rate increase for one day, and consolidate the section 4 rate suspension docket with the area proceeding at Docket No. AR64-1. Petitioner thereby would be permitted, *pendente lite,* to collect an increased rate—subject to full refunds—and the question of the just and reasonable rate could then be postponed until issuance of the final area order, all without any possible detriment to the public or the Commission's area approach.

The Commission does not lack either the ingenuity or the flexibility to honor simultaneously the principles announced by this Court in *Sierra* and *Mobile* and the requirements of its own area approach in a manner such as that suggested above. Accordingly, there is no inherent conflict between the two goals.

II

Failure to Mention Sierra and Mobile Does Not Avoid Conflict Therewith

The Commission carefully suggests that neither the Commission nor the court below "has *purported* to decide anything with respect to petitioner's *ultimate* right to relief under *Mobile* or *Sierra,*" relying upon the fact that the decision of the court below made no reference to either *Mobile* or *Sierra* "or to the issues petitioner seeks to raise" (Opp. Br. 12) (emphasis supplied). Petitioner does not dissent from the statement that the court below made no reference to those cases and failed to discuss the issues involved. But that fact does not mean that the decisions below do not conflict with principles announced by this Court. On the contrary, the Commission's failure to discuss the *Sierra* relief sought by petitioner (as distin-

guished from other kinds of *Sierra* relief) supports petitioner's contention that the Commission failed to follow *Sierra* and *Mobile*. Similar support is provided by the failure of the court below to mention *Sierra* or *Mobile* or to recognize that more is involved than "whether there was substantial *evidence* before the Commission to support its findings and order" (Pet. App. 8a-9a) (emphasis supplied).

III

"Special-Exemption" Section of Commission's Permian Decision Suggests No Solution

Nor does the Commission's first area rate decision in *Permian*[3] lessen the effect of its refusal to follow *Sierra* and *Mobile*. The petition herein has already discussed (Pet. 15-16) the ineffectiveness of the *Permian* "minimum-rate" approach (Pet. App. 16a-18a) as respects the requirements of *Sierra* and *Mobile* in the context of this case. The Commission now asserts that the procedure established in *Permian* for a "special exemption" from the area rate there established is an example of how petitioner may ultimately obtain the *Sierra* relief it seeks (see *e.g.* Opp. Br. 14). But this "savings-clause" approach no more honors the requirements of *Sierra* and *Mobile* than does the "minimum-rate" approach. It simply provides that *after* an area rate has finally been established a producer "may file a petition" for special relief and that such petition "will be disposed of as promptly as possible" (Opp. App. 18). By its own terms, therefore, this "savings clause" only heightens the already acute delay problem discussed in the petition (see *e.g.* Pet. 16-17, n. 15),

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[3] Area Rate Proceeding, AR61-1, Opinion No. 468, 34 FPC —— (August 5, 1965), *appeal pending* (10th Cir. Nos. 8385, *et al.*).

and it finally admits that even more delay is involved than ever has been claimed by petitioner. At the same time, it fails to give recognition to the principles of *Mobile* and *Sierra* which, by definition, require relief now if at all.

IV

Conclusion

For the foregoing reasons, as well as those set forth in the petition for a writ of certiorari herein, that petition should be granted.

Respectfully submitted,

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Dated at Washington, D. C.
this 29th day of March, 1966